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No. 06-1050

In The

Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, ET AL.,

Petitioners,

v.

UTAH TRANSIT AUTHORITY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents Utah Transit Authority and John Inglish (together, "UTA") file this Response in Opposition to Petitioners Lisa Burke and Michael Carper's ("Petitioners") petition for writ of certiorari ("Petition") to the Tenth Circuit Court of Appeals.

SUMMARY OF REASONS TO DENY THE PETITION

The Petition should be denied for several reasons. First, Petitioners failed to properly raise these issues before the lower courts. Petitioners presented no evidence in support of their claim that the existing system-wide bargaining unit at UTA was not "appropriate" in violation of Utah Code § 17A-2-1031. Although Petitioners argued that determination of the appropriateness of a bargaining unit is an inherently factual question, they never presented any evidence and therefore never created a genuine dispute of material fact on that issue. Thus, the Tenth Circuit did not address Petitioners' 12-factor "test" for determining the appropriateness of a bargaining unit and did not state any position, let alone one that conflicts with other circuit court decisions. Petitioners also failed to preserve their free speech arguments because they did not make their arguments to the Tenth Circuit. Those arguments were therefore waived.

Second, Petitioners have failed to demonstrate any kind of a circuit split. Petitioners claim that the lower courts had a duty to apply federal standards in determining whether the existing bargaining unit was appropriate. The law is clear, however, that state labor laws apply, although

the substantive content of those state labor laws must be consistent with federal labor policy. Furthermore, the Tenth Circuit expressly stated this principle and followed it.

Petitioners have also failed to demonstrate a circuit split relating to their free speech claim. Indeed, there could not have been a circuit split because Petitioners never made the arguments advanced in their Petition to this Court to the Tenth Circuit and that court therefore never resolved them. The Tenth Circuit decision does not even mention any First Amendment claim and stated no position. Accordingly, there is no conflict between the Tenth Circuit decision in this case and the cases cited by Petitioners.

Finally, the Petition should not be granted because each of the proposed "questions presented" relating to UTA were correctly decided by the lower courts. The Tenth Circuit correctly determined, based on this Court's precedents, that there is no claim against UTA for a violation of Section 13(c) of the Urban Mass Transportation Act (49 U.S.C. § 5333(b)); only for breach of the 13(c) agreement, which was never alleged in Petitioners' complaint. The Tenth Circuit was also correct in holding, based on undisputed evidence, that the existing bargaining unit was appropriate, and that UTA therefore did not violate Utah Code § 17A-2-1031 in recognizing and bargaining exclusively with Local 382, the existing bargaining representative. Similarly, the district court correctly determined that Petitioners' First Amendment claim was without merit based on this Court's decision in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

A. Statement of Facts.

The Utah Transit Authority ("UTA") is a political subdivision of the State of Utah. It was established in 1969 to purchase the assets of private transit companies operating in the Salt Lake City metropolitan area and to provide a public transit service. For many years, UTA provided mass transportation services primarily through the use of buses. However, in 1999, UTA commenced light rail, or "TRAX," operations. Petitioners are currently employed by UTA as TRAX operators (drivers). Aplt. App. at 73.

Amalgamated Transit Union Local 382 ("Local 382") was recognized as the exclusive collective bargaining representative for UTA's operations, maintenance, and parts employees in 1904. Since then, it has continuously represented bargaining unit employees at UTA, always in a single, system-wide bargaining unit. In the early years of the twentieth century, Local 382 represented streetcar employees, as gasoline powered buses were not yet in existence. In the 1940s, streetcars were phased out and buses were substituted. During this period, Local 382 represented both bus employees and streetcar employees. After streetcars were phased out, Local 382 represented only bus employees until UTA commenced TRAX operations in 1999. Aplt. App. at 73, 112-14.

In 1995, as UTA planned to implement TRAX operations, UTA and Local 382 (in its capacity as bargaining representative of UTA's operations, maintenance and parts employees) negotiated the issue of whether the new TRAX jobs would be considered union or non-union work. At the conclusion of those negotiations, UTA and Local 382

agreed essentially that Local 382 would have the power and authority to bargain for positions performing work in the TRAX unit that was *comparable* to work performed by bargaining unit employees in bus units, *i.e.*, operations, parts and maintenance. Aplt. App. at 73-74, 113-14.

This initial agreement was followed in July 1998 by a subsequent agreement that, among other things, TRAX employees would be drawn from UTA's existing bus units and that bus employees transferring into the TRAX business unit would retain the same seniority they had accumulated as bus employees. Thus, seniority would be tracked on a system-wide basis (within the categories of operations, parts, and maintenance), not separately for TRAX and bus employees. Aplt. App. at 73-74, 113-14. This agreement on transfer and seniority was then included in the parties' 1998 collective bargaining agreement ("1998 Labor Contract"), which was duly ratified by Local 382's membership. Aplt. App. at 73-74, 113-14, 125-26. The 1998 Labor Contract also recognized Local 382 as the exclusive representative of employees covered by the contract, including TRAX employees.

The effect of these agreements was to set aside the new TRAX jobs for existing UTA employees who were members of the system-wide bargaining unit represented by Local 382. Petitioners were members of that system-wide bargaining unit and were beneficiaries of these agreements.

Pursuant to the transfer and seniority provisions set out in the 1998 Labor Contract, Petitioners transferred into the TRAX unit in late 1999 and early 2000, along with numerous other UTA employees, as TRAX operations were getting under way. Aplt. App. at 125. During that initial

time period, and on regular occasions thereafter, additional operations, parts and maintenance employees transferred from UTA bus units to the TRAX unit. The initial complement of employees was entirely made up of employees from the bus division. UTA now has employees who were hired directly into TRAX, but they were not hired until later. Aplt. App. at 113-14, 126.

In August 2003, after several years of work under the 1998 Labor Contract, UTA and Local 382 began negotiating a new collective bargaining agreement. The negotiations resulted in a tentative agreement in May 2004, but it failed to win ratification from employees. Aplt. App. at 127. On July 27, 2004, after further negotiations, UTA and Local 382 signed a second tentative agreement. Thereafter, it was distributed to employees in preparation for a vote on ratification. Aplt. App. at 127.

On August 5, 2004, a few days before a vote on ratification, Petitioners submitted to UTA management a petition from TRAX operators demanding a separate union. UTA had not previously received any formal objection to the existing bargaining unit. Aplt. App. at 153-54. Because UTA had already agreed with Local 382 to recognize it as the representative of the majority of employees in the system-wide bargaining unit, and was therefore obligated to bargain with it exclusively, it disregarded the petition.

On August 10, 2004, UTA employees ratified the collective bargaining agreement effective as of December 11, 2003 ("2003 Labor Contract"). Aplt. App. at 127. The 2003 Labor Contract states that UTA "recognizes the Union [Local 382] as the sole and exclusive collective

bargaining agent for all bus and TRAX operators . . . , parts and maintenance employees" of UTA. Aplee. Supp. App. at 132. The 2003 Labor Contract also maintained the same language regarding transfer of employees into the TRAX unit and seniority. However, it also included a side letter agreement that established a task team to study the seniority issue. Aplt. App. at 75, Aplee. Supp. at 245.

The vast majority of transit authorities across the United States that provide both bus and light rail operations include bus and rail employees in the same collective bargaining unit and represented by the same union. Aplt. App. at 13, 100-11, 116-23, 127-28.

As a condition to UTA's receipt of funding from the Federal Transit Administration, UTA is required to enter into an agreement with employee representatives pursuant to Section 13(c) of the Urban Mass Transportation Act ("UMTA") (codified at 49 U.S.C. § 5333(b)) ("Section 13(c)") that contains labor protective conditions. These protective conditions have been applied to all federal capital funding received by UTA pursuant to the Federal Transit Act since 1993. Aplt. App. at 128; Aplee. Supp. App. at 261-66. The 1998 and 2004 Labor Contracts are both agreements for purposes of Section 13(c), and both have been certified by the Department of Labor as sufficiently protective of labor conditions to comply with Section 13(c)'s requirements.

Petitioners' ultimate goals, as stated in their complaint, are to secure a change in the existing seniority rules so that bus operators cannot "bump" into the TRAX seniority roster, Aplt. App. at 13, and to get higher pay. *Id.* at 14.

B. Proceedings Below.

On October 22, 2004, Petitioners filed this action in the district court, alleging several claims arising out of UTA's refusal to recognize and bargain with a separate collective bargaining unit for the TRAX operators. Petitioners alleged that UTA and John Inglish (UTA's managing director) violated Section 13(c) and Utah Code § 17A-2-1031 ("Section 1031"), a statute that specifically sets out the collective bargaining rights of transit employees under Utah law. Petitioners also alleged that UTA violated Petitioners' First Amendment rights of free speech and free association by refusing Petitioners' request for access to bulletin boards similar to the access accorded to Local 382. Petitioners also alleged a claim of breach of fiduciary duty against Local 382 and a claim against the Department of Labor ("DOL") for improperly certifying UTA's Section 13(c) agreement as sufficiently protective of employee rights.

On November 29, 2004, Petitioners filed a motion for preliminary injunction in which they sought to bar UTA from (1) transferring bus employees to the TRAX division; and (2) allowing such transferred employees to have system-wide seniority. Petitioners also asked the district court to order UTA to allow them to post information on UTA bulletin boards regarding their efforts to organize a separate bargaining unit. The motion for preliminary injunction was heard on January 24, 2005 and subsequently denied by order dated January 25, 2005 (despite the denial, UTA allowed Petitioners to post information on a UTA bulletin board). Petitioners did not appeal this denial.

On January 31, 2005, less than a week later, Petitioners filed another motion styled as a motion for preliminary injunction, this time seeking an order barring UTA from

continuing to recognize Local 382 as bargaining representative for TRAX employees. The stated basis for the second motion was that the district court's "previous order was manifest error because it applied the wrong legal standard to the facts." Aplt. App. (Case 05-4079) at 191. This motion, effectively a motion for reconsideration, was heard on April 9, 2005 and denied orally in court. Aplt. App. (Case 05-4079) at 317; Exhibit A hereto (transcript).

On December 22, 2004, the DOL moved to dismiss the cause of action against it on grounds that no objection regarding the bargaining unit was asserted when the DOL approved UTA's Section 13(c) agreement in 2001. The district court granted this motion by order dated April 6, 2005.

On March 25, 2005, UTA filed a motion for summary judgment, arguing that Petitioners had no evidence in support of their main contention that the system-wide bargaining unit was not appropriate and therefore in violation of Utah Code § 17A-2-1031. Petitioners responded on the merits, but also filed a motion pursuant to Rule 56(f) for additional time to conduct discovery. After briefing and oral argument, the district court took these motions under advisement.[1]

At 11:48 p.m. on Sunday evening, August 14, 2005, Petitioners filed a motion for leave to amend their complaint in the district court's outside drop box. Aplt. App. at

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[1] Petitioners' assertion that the district court expressed concern that its decision "might not be sustained" is incorrect. The court asked the parties to address the issue of whether the court should defer to arbitration. None of the parties sought to arbitrate, and the court did not address the issue in its decision.

169 (clerk's stamp). There was no looming litigation deadline, so filing the motion in that fashion was, at the least, highly unusual. On the very next day, August 15, the district court issued its order granting UTA's motion for summary judgment and administratively closing the case.

Instead of pursuing their motion to amend, Petitioners filed a notice of appeal on August 22, 2005, Aplt. App. at 9, one week after entry of the district court order granting summary judgment and two weeks before the due date for UTA's memorandum in opposition to the motion for leave to amend complaint. As a result, the case went up to the Tenth Circuit on appeal without any resolution of the motion to amend.

The Tenth Circuit Court of Appeals affirmed the district court orders. The court first held that Petitioners' only claim under Section 13(c) was for breach of UTA's 13(c) agreement, a state law claim that was never alleged. Pet. App. at 10a-11a (citing *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 27-28 (1982)). The court then affirmed summary judgment for UTA on grounds that Petitioners failed to present evidence showing that the existing system-wide bargaining unit was not "appropriate," and therefore that UTA did not violate Section 1031 when it refused to recognize a separate bargaining unit only for TRAX operators. The Tenth Circuit opinion did not mention the free speech claim, which is not surprising given that Petitioners only devoted three sentences to this claim in their brief and

offered no legal analysis or argument demonstrating that the district court erred by dismissing the claim.[2]

The court affirmed the dismissal of Petitioners' claim against the DOL on grounds that UTA complied with Section 13(c) and that the DOL acted properly in certifying UTA's protective arrangements in 2001 and 2006. Finally, the court affirmed the dismissal without prejudice of the state law claim of breach of fiduciary duty against Local 382.

REASONS FOR DENYING THE PETITION

The issues presented in this case deal mainly with Utah law, not federal law, and have created no split of authority among the federal circuit courts. The claims were dismissed for the simple reason that Petitioners failed to present admissible evidence in support of those claims in response to UTA's motion for summary judgment. Finally, the lower courts decided the legal issues correctly. Accordingly, there is no compelling reason to grant the Petition.

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[2] The only discussion by Petitioners of their free speech claim in their briefs to the Tenth Circuit was the following three sentences on page 25 of their Opening Brief in case no. 05-4222:

> Additionally, the affidavits against Katherine Pett, UTA General Counsel supported a free speech claim against UTA. Aplt. App. A at 38, 39 and Aplt. App. A at 75-77. These actions also support plaintiffs' 1983 claims since it is the constitutional violations that primarily support the 1983 cause of action. The plaintiffs clearly distinguished precedent cited by the trial court used to ignore the evidence [sic].

I. PETITIONERS' ARGUMENT REGARDING THE APPROPRIATENESS OF THE BARGAINING UNIT WAS NOT PROPERLY PRESENTED TO THE LOWER COURTS, DOES NOT PRESENT A QUESTION OF FEDERAL LAW, AND WAS CORRECTLY DECIDED.

Petitioners argue that the Court should grant the Petition because the lower courts did not explicitly consider a list of 12 factors in evaluating the appropriateness of the collective bargaining unit in this case, and instead determined that the unit was appropriate based on consideration of only a few factors. According to Petitioners, this creates a circuit split because the 12-factor test is required by federal law, and the lower courts improperly applied Utah law, not federal labor law, in holding that the existing system-wide bargaining unit at UTA was appropriate, and in approving a bargaining unit that was *negotiated* between UTA and Local 382. Petitioners argue that these lower court rulings conflict with decisions of the District of Columbia Circuit and the Third Circuit Courts of Appeals. Petitioners' arguments lack merit for several reasons.

First, Petitioners never properly raised to the lower courts the specific 12-factor test on which they base their argument because they failed to present evidence on those factors in response to UTA's motion for summary judgment. Second, the lower court decisions approving the existing bargaining unit were in fact based on federal labor policy, whether or not those courts explicitly applied the 12-factor "test" Petitioners have cited. Third, it is well-settled that the scope of a bargaining unit may be negotiated between the parties to a labor contract, as long as the unit is appropriate. Accordingly, there is no circuit

split at all, and no reason, much less a compelling reason, to grant the petition.

A. The Tenth Circuit Decision Creates No Circuit Split.

Section 13(c) of the UMTA provides that as a condition of financial assistance from the federal government, the interests of public transit employees affected by the financial assistance "shall be protected under arrangements the Secretary of Labor concludes are fair and equitable." 49 U.S.C. § 5333(b). Such arrangements are to include the "continuation of collective bargaining rights." *Id.* In this case, the Department of Labor certified that the arrangements provided by UTA for the protection of its employees, including the protection of its employees' collective bargaining rights pursuant to Section 13(c), are fair and equitable. Aplee. Supp. App. at 267-70.

Applicable case law makes clear that the term "collective bargaining rights," as used in Section 13(c), incorporates the general substance of federal labor *policy*, but not federal labor law itself. This point was explained in *Amalgamated Transit Union International v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986), the leading case on Section 13(c) labor standards and the case on which Petitioners rely:

> [Section 13(c)] provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c), for to do so would force states to choose between federal transit aid and their

> exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

767 F.2d at 950-51.

Donovan's description of the substantive content of federal labor policy makes clear that federal labor *policy* does not include all of the procedural and other details of federal labor *law*. States can provide for the "continuation of collective bargaining rights," and thus comply with Section 13(c), without providing all of the National Labor Relations Board's rules and procedures. This principle plainly extends to the determination of an appropriate bargaining unit. Although it is fair to assume that the *Donovan* reference to the right to be "represented" in "meaningful negotiations" encompasses within it a right to be in an *appropriate bargaining unit*, the particular method of determining an appropriate bargaining unit cannot fairly be described as "substantive." Federal labor policy dictates that the bargaining unit be "appropriate," but not that its precise scope or appropriateness be determined according to any particular procedure.

The Tenth Circuit decision did not conflict with *Donovan* in any way. Indeed, the Tenth Circuit explicitly acknowledged that the Utah statute at issue must be

interpreted consistently with UMTA. Pet. App. at 12a ("Because this provision was enacted to ensure federal funding under UMTA, we read appropriate to mean any unit sufficient to comply with UMTA."). The Tenth Circuit then applied federal labor policy to determine whether the existing bargaining unit was appropriate. Specifically, the Tenth Circuit determined that the existing system-wide unit was appropriate based on bargaining history, existing practice throughout the country, prior decisions of the National Labor Relations Board dealing with transit employees, and the lack of any indication that the existing bargaining unit had impaired bargaining rights. Pet. App. at 13a-14a (citing federal cases).

The Tenth Circuit also analyzed Petitioners' arguments regarding the federal labor doctrines of accretion and severance, and ultimately concluded that severance, not accretion, was the more applicable analytical tool, contrary to Petitioners' argument. The court held, as did the district court, that Petitioners had failed to establish a basis for severing TRAX operators from the existing bargaining unit. Pet. App. at 14a-19a (citing federal cases). Petitioners disagree with this conclusion but have not demonstrated how it creates a circuit split.

B. Petitioners Never Properly Presented The 12-Factor Test They Claim The Lower Courts Were Required To Consider.

Petitioners argue that the Tenth Circuit should have explicitly applied a 12-factor test applied by the Fourth Circuit in *Baltimore Sun Company v. N.L.R.B.*, 257 F.3d 419, 429 (4th Cir. 2001). But those factors were never properly raised by Petitioners before the Tenth Circuit or the district court. This matter was addressed by the

district court in the context of a motion for summary judgment, which requires that the non-moving party, on issues where it has the burden of proof, come forward with admissible evidence of its position in order to raise a genuine dispute of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

Although Petitioners cited the 12-factor test to the lower courts and argued that the determination of an appropriate bargaining unit was inherently factual, they failed to present evidence relevant to any of those factors. Because Petitioners, as plaintiffs asserting the violation of Section 1031 (which requires UTA to recognize and bargain with the representative of a majority of employees in an "appropriate" bargaining unit), had the burden of proving that the existing unit was not appropriate, their failure to present evidence on that point made it unnecessary to consider each of the 12 factors Petitioners now claim must be applied every time a court or the National Labor Relations Board determines the appropriateness of a bargaining unit. In fact, Petitioners' failure to present evidence made it impossible to analyze those factors. Accordingly, the Tenth Circuit did not fail to apply federal labor policy or reject any federal test for evaluating the appropriateness of a bargaining unit. There is no conflict between the Tenth Circuit's decision in this case and the D.C. Circuit's decision in *Donovan*.

C. The Tenth Circuit Decision Affirmed The District Court's Decision And Also Correctly Determined That The Bargaining Unit Is Appropriate.

Moreover, the Tenth Circuit was correct in affirming the district court, notwithstanding Petitioners' argument

that the district court used a "new legal standard" in granting summary judgment. Petitioners complain that "without notice to Petitioners, the district court created a legal standard without a legal basis in federal or state law. The district court took this action after the non-moving party had filed its opposition to summary judgment and requested discovery under the only identified standard." Pet. at 15. This completely distorts the action of the district court.

1. Petitioners received proper notice of the factors the lower courts relied on to decide the appropriateness of the bargaining unit.

In the first place, the district court merely resolved arguments that were made by the parties. The facts relied on by the district court were alleged by UTA and supported with admissible evidence, and the arguments based on those facts were made by UTA in the legal briefs UTA submitted to the district court and served on Petitioners. Petitioners were therefore given ample notice, as provided for in the Federal Rules of Civil Procedure, and had every opportunity to respond pursuant to those rules.

Indeed, Petitioners did respond. However, instead of claiming that the district court was unfairly considering a legal standard of its own creation, as they argue to this Court, Petitioners argued that TRAX employees had been improperly "accreted" into the system-wide bargaining unit. The district court and the Tenth Circuit concluded that accretion did not apply, but did not claim it was a federal doctrine that could never apply. Instead, the lower courts concluded that severance, another federal labor doctrine dealing with the appropriateness of bargaining

units, was applicable, and applied that doctrine in dismissing Petitioners' claim that UTA violated Utah labor law.

2. The Tenth Circuit decision does not conflict with the Third Circuit decision in *Paper Manufacturers*.

Petitioners also claim that the Tenth Circuit's decision is in conflict with the purported holding of *N.L.R.B. v. Paper Manufacturers Company*, 786 F.2d 163, 167 (3rd Cir. 1986) that "[r]epresentation issues may not be decided by contract, and thus may not be decided by an arbitrator." Petitioners claim the Tenth Circuit decision is in conflict with the Third Circuit decision in *Paper Manufacturers* because it approved the bargaining unit agreed upon by UTA and Local 382 in the 2003 Labor Contract. Pet. at 11-12.

This argument fails for several reasons. First, the Tenth Circuit independently determined that the existing bargaining unit was appropriate under Section 1031, which it interpreted based on federal labor policy. It did not decide the unit was appropriate simply because it was agreed between the parties. Second, *Paper Manufacturers* does not hold that parties to a collective bargaining agreement may not negotiate and come to agreement on the scope of the bargaining unit; it merely holds that the Board need not defer to the decision of an arbitrator interpreting such an agreement. *Paper Manufacturers*, 786 F.2d at 167. Indeed, in *Paper Manufacturers*, a rival union had already sought a ruling from the Board at the time of an arbitration on the same issue. There was no such rival union, arbitration, or Board proceeding in this case. Third, this Court has already held that representation issues can be arbitrated. *Carey v. Westinghouse*

Electric Corp., 375 U.S. 261, 272 (1964) (representation issues can be arbitrated; "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence"). There is no need for further consideration of the same issue. Most importantly, it is undisputed that the Board had no jurisdiction in this case because UTA is a political subdivision of the state of Utah and therefore could not have decided on the applicable bargaining unit. Accordingly, *Paper Manufacturers* is irrelevant.

In any event, contrary to Petitioners' argument, it is well-settled that parties to a collective bargaining agreement may negotiate over the scope of the bargaining unit, and that such agreements will be upheld by the Board so long as the agreed upon unit is appropriate. As stated in a respected labor law treatise, the scope of the bargaining unit is a permissive subject of bargaining:

> Whenever bargaining takes place without a prior Board definition of the unit, the parties must agree upon the unit to be covered by the contract they negotiate. . . . Even when the Board has defined a unit, the parties are free to agree on a negotiated unit different from the certified or recognized unit. . . . The Board accepts as lawful the bargaining units that the parties establish by consensual agreement.

1 Patrick Hardin & John E. Higgins, Jr., The Developing Labor Law, 1257-58 (4th ed. 2001). *See, e.g.*, *Kroger Co.*, 219 N.L.R.B. 388, 389 (1975) (approving collective bargaining agreement that included employees at employer's future locations in the bargaining unit). Furthermore, where there is no administrative agency with jurisdiction

to decide labor questions such as the determination of an appropriate bargaining unit, the parties typically determine the scope of the bargaining unit by agreement. Lee C. Shaw & R. Theodore Clark, Jr., *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 Or. L. Rev. 151, 152-53 (1971-72) ("In states which do not have applicable legislation, the determination of the appropriate bargaining unit is made by the parties."). For these reasons, the Tenth Circuit opinion does not conflict with any other circuit on the issue of the parties' ability to establish the scope of a collective bargaining unit in contract negotiations.

3. Petitioners have an adequate remedy under state law.

Finally, Petitioners incorrectly argue that the Tenth Circuit decision effectively deprives them of any mechanism under Utah law for challenging the appropriateness of the bargaining unit, in violation of Section 13(c). However, Section 1031 specifically requires UTA to recognize and bargain exclusively with the majority representative of its employees in an "appropriate" bargaining unit. Utah Code Ann. § 17A-2-1031. If the existing bargaining unit is not appropriate, UTA would be in violation of the statutory requirement, and would be subject to suit in state court. *Cf. Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 27-28 (1982) (Section 13(c) requires, as condition of federal funding, that state labor laws provide for a continuation of collective bargaining rights; violations are cognizable as breach of contract actions in state court).

II. THE COURT SHOULD NOT CONSIDER PETITIONERS' THIRD QUESTION PRESENTED REGARDING THEIR FREE SPEECH CLAIM.

A. Petitioners' Argument That The District Court Misapplied The Law In Dismissing Their Free Speech Claim Was Waived Because It Was Not Made To The Court Of Appeals.

The Court should not consider Petitioners' argument that the district court misapplied the law in dismissing their free speech claim because this argument was never raised in the Tenth Circuit. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question not raised in the court of appeals was not properly before the Supreme Court). Further, because Petitioners failed to raise this issue in their opening brief before the court of appeals, the issue is waived. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984, n.7 (10th Cir. 1994).

1. Petitioners Did Not Raise the Argument that the District Court's Application of *Perry* was Wrong.

Petitioners did not cite, discuss, analyze or even mention the case of *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), or *Texas State Teachers Ass'n v. Garland Ind. School District*, 777 F.2d 1046 (5th Cir. 1985), in their appeal to the Tenth Cir[illegible], or otherwise try to argue or show in any way that the district court's application of *Perry* was in error or inconsistent with *Garland* or the law of any other circuit. Therefore, the Defendants had no opportunity to address any such argument, and the Tenth Circuit was not given the opportunity to consider or decide the issue. The issue is waived,

and the Court should not allow Petitioners to now make this argument for the first time on appeal to this Court.

2. Petitioners Did Not Raise the Argument that the District Court Improperly Found that Their Speech was Not on a Matter of Public Concern.

Petitioners' argument to this Court that their speech concerning "union organizing efforts" was of public concern and therefore entitled to First Amendment protection under the authority of *Connick v. Meyers*, 461 U.S. 138 (1983) was likewise never made to the court of appeals and was therefore waived. Petitioners never raised this issue on appeal nor did they assert that the district court erred by holding that the Petitioners' speech was not on a matter of public concern. Indeed, they could not do so, because as they acknowledged in their petition to this Court, the district court never so held, and in fact did not discuss the issue at all and did not rely upon any such holding as a basis for granting UTA's motion for summary judgment. *See* Pet. App., pp. 33a-34a.

B. There Is No Split Of Authority Between The Circuits For The Court To Resolve Because The Tenth Circuit's Opinion In This Case Is Not Contrary To The Fifth Circuit's *Garland* Decision Or The Decision Of Any Other Court.

The Tenth Circuit's opinion says nothing about *Perry*, *Garland* or whether the district court properly applied the law in dismissing Petitioners' free speech claim. This is not surprising because Petitioners never raised or discussed this issue on appeal and never cited, discussed or analyzed

Perry or *Garland*. The Tenth Circuit's opinion in this case in no way contradicts *Garland*, or any other circuit court opinion on this issue because it never considered or decided this issue. Therefore, there is no split of authority between the circuits for this Court to resolve.

C. In Any Event, The District Court Did Not Misapply The Law.

Petitioners' free speech claim is based upon UTA's initial denial of their request to post information on an internal non-public bulletin board concerning their desire to organize a rival to their exclusive bargaining agent, Local 382 of the Amalgamated Transit Union. There is no dispute that this desire was motivated by their belief that Local 382 did not do enough in contract negotiations to ensure that they got higher pay and better shifts than transferred bus operators with more company-wide seniority. UTA allowed Petitioners to post the information they desired on the bulletin board shortly after the complaint was filed, but has always maintained that Petitioners had no constitutional right to do so.

As pointed out in UTA's motion for summary judgment, there is no dispute that the internal bulletin board in UTA's workplace to which Petitioners demanded access was a non-public forum. As such, UTA had the right to impose reasonable restrictions on its use to protect its legitimate interests. *Perry*, 480 U.S. at 51-52. One such interest is "to prevent the [workplace] from becoming a battlefield for inter-union squabbles" and "in ensuring labor peace in the workplace." *Perry*, 460 U.S. at 52. A reasonable restriction for protecting that interest is to

provide access to a recognized exclusive bargaining representative to use internal communication methods to communicate with employees, and exclude rivals to the union from using these methods. *Id.*

Petitioners attempted to distinguish *Perry* in the district court simply by asserting that it should not apply because a "rival union" was excluded from access in that case, not a group of dissident employees seeking to organize a rival union. The district court properly determined that this was not a meaningful distinction, because the *Perry* holding was not based upon the form of the group seeking access, but upon the public employer's legitimate interest in "ensuring labor peace in its workplace" and preventing the workplace "from becoming a battlefield for inter-union squabbles."

Contrary to Petitioners' assertions, the *Perry* holding was not improperly "expanded" by the district court and was not applied by the district court in a manner contrary to the holding in *Texas State Teachers Ass'n v. Garland Ind. School District*, 777 F.2d 1046 (5th Cir. 1985). The *Garland* court declared unconstitutional a school policy which totally prohibited its teachers from communicating with one another concerning any employee organization, including a total prohibition against dissemination of any information concerning employee organizations on bulletin boards which were set aside for the teachers' personal use. This was not the issue in this case or in *Perry*. Instead, as here, *Perry* involved a request by a group which was a rival to the employees' exclusive bargaining agent to have access equal to the bargaining agent's access to a non-public forum. Further, the *Garland* court noted that unlike the school district in that case, the school district in *Perry*

did not prohibit the teachers' access to internal communication methods to speak on teacher issues, because it expressly granted that access to the teachers' recognized bargaining representative. *Garland*, 777 F.2d at 1052, n.6.

Furthermore, the test for determining the constitutionality of restrictions on the speech of public school teachers is not applicable to other public employees in other settings. The *Garland* court applied the so-called *Tinker* test, derived from the case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which held that student and teacher communications in a public school may be suppressed only when "the expression or method of exercise materially and substantially interferes with the activities or discipline of the school." *Garland* at 1053. However, this test has been rejected by the courts in other public employer settings because the rationale for imposing such a stringent standard is unique to the public school setting. Instead the public concern balancing test enunciated in the *Connick* case is the appropriate test to apply in public employee cases not involving the speech of teachers in schools. *See, e.g.*, *King v. Downing*, 58 Fed. Appx. 830 (10th Cir. 2003).

Under the public concern balancing test, the court balances the interest of the public employee in speaking in the workplace on "matters of public concern" against the public employer's interest in regulating the speech of its employees so it can carry on an efficient and effective workplace. *Moore v. City of Wynnewood*, 57 F.3d 924, 931 (10th Cir. 1995). The *Perry* case establishes that a government employer may, without violating free speech rights, give a recognized exclusive bargaining representative access to its internal non-public communication methods and exclude rival groups from accessing these

methods, because of the strong legitimate interest of the government employer in "ensuring labor peace within the workplace" and preventing the workplace "from becoming a battlefield for inter-union squabbles." This interest outweighs Petitioners' interest in having equal access to non-public inter-company bulletin boards, even if their attempt to organize a rival union for the purpose of preserving their personal interest in choosing favorable work shifts were considered to be a matter of public concern.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, UTA respectfully requests that the Petition be denied.

Respectfully submitted,

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